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No. _____

In The

Supreme Court of the United States

October Term, 1998

CHARLES GOSS,

Cross-Petitioner,

vs.

CITY OF LITTLE ROCK,

Cross-Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a separate, severable issue, not designated as an issue on appeal, may be reversed *sua sponte* by an appellate court.

Whether a mandatory injunction may be reversed by an appellate court absent a finding of abuse of discretion or impropriety on the part of the lower court.

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CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-Petitioner Charles Goss respectfully submits his Conditional Cross-Petition for Writ of Certiorari, pursuant to Rule 12.5 of the *Rules of the Supreme Court of the United States*, to review the decision of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS DELIVERED BELOW

The most recent opinion of the United States Court of Appeals for the Eighth Circuit is reported at 151 F.3d 861 (8th Cir. 1998), was issued on August 10, 1998, and is printed in its entirety at Appendix A of the Petition for Writ of Certiorari filed herein by Petitioner City of Little Rock. The Order of the United States Court of Appeals for the Eighth Circuit denying the City of Little Rock's petition for rehearing and the suggestion for rehearing *en banc* was issued on October 1, 1998, and is printed in its entirety at Appendix G of the Petition for Writ of Certiorari filed herein by Petitioner City of Little Rock. The previous opinion of the United States Court of Appeals for the Eighth Circuit is reported at 90 F.3d 306 (8th Cir. 1996), was issued on July 23, 1996, and is printed in its entirety at Appendix B of the Petition for Writ of Certiorari filed herein by Petitioner City of Little Rock. The relevant prior orders of the United States District Court, Eastern District of Arkansas, Western Division, are unreported, were issued on September 25, 1995 (Memorandum and Order), October 25, 1995 (Order), February 20, 1997 (Memorandum and Order), and May 13, 1997

(Order), respectively, and are printed in their entirety at Appendices C through F, respectively, of the Petition for Writ of Certiorari filed herein by Petitioner City of Little Rock.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The opinion of the United States Court of Appeals for the Eighth Circuit was delivered on August 10, 1998. *See* Petitioner's Appendix A. On October 1, 1998, the United States Court of Appeals for the Eighth Circuit denied Petitioner's timely Petition for Rehearing and Suggestion for Rehearing *En Banc*. *See* Petitioner's Appendix G. This Conditional Cross-Petition is filed in response to the Petition for Writ of Certiorari filed by Petitioner City of Little Rock, docketed on December 30, 1998, as United States Supreme Court Docket Number 98-1056. This Conditional Cross-Petition is filed within the time allowed by law in Rule 12.5 of the *Rules of the Supreme Court of the United States*, upon which rule Cross-Petitioner expressly relies. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 5 to the United States Constitution states in pertinent part as follows:

> No person shall . . . be deprived of . . . property, without due process of law; nor shall private

> property be taken for public use, without just compensation.

Amendment 14, Section 1 to the United States Constitution states in pertinent part as follows:

> . . . [N]or shall any state deprive any person of . . . property, without due process of law . . .

Article 2, Section 22 of the Arkansas Constitution of 1874 states as follows:

> The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor.

STATEMENT OF THE CASE

Cross-Petitioner, Charles Goss, owns a small business in Little Rock, Arkansas, consisting of a convenience store, gas station, laundromat and car wash, which small business Mr. Goss has owned since 1973. Petitioner City of Little Rock, Arkansas, is a municipality, and is the capitol of the State of Arkansas.

In 1971, at the time Mr. Goss purchased the approximately 3.7 acres of property at issue, the property was located in a portion of rural, unincorporated Pulaski County, some ten (10) miles southwest of downtown Little Rock. Within two (2) years after purchasing the property, Mr. Goss began to operate a series of small, neighborhood-oriented businesses upon the property, including a convenience store, gas station, laundromat and car wash. In 1985, the City of Little Rock annexed

that portion of rural, unincorporated Pulaski County within which Mr. Goss' property is located, and zoned the area by default as R-2, Single Family Residential. As the R-2 zoning imposed by default upon the property did not conform to the use to which the property was being put in 1985, Mr. Goss continued to utilize the property as he had since 1973 pursuant to the non-conforming use exception in the Little Rock City Ordinances.

As the R-2 zoning imposed by default upon the property did not conform to the use of the property, and as Mr. Goss needed the property rezoned to conform to its use in order to sell the property, in early 1993 Mr. Goss applied to the City for rezoning of the property. After completion of the application, Mr. Goss went before the City's Planning Commission, which recommended that Mr. Goss' rezoning application be approved, *on the condition that* Mr. Goss' deed to the City, via a Quitclaim Deed supplied by the City's Planning Commission, a 55 foot right-of-way extending across his 633.38 feet of frontage on Stagecoach Road, also known as State Highway Number Five. The City's Planning Commission informed Mr. Goss via letter that if Mr. Goss did not deliver the demanded Quitclaim Deed to the City within twenty (20) days, the City's Planning Commission would take approval of Mr. Goss' rezoning petition off of the City Board of Directors' meeting agenda. Mr. Goss refused to deliver the demanded Quitclaim Deed to the City's Planning Commission, and his rezoning petition was taken off of the City Board of Directors' meeting agenda. Instead, Mr. Goss asked that the dedication requirement imposed by the City's Planning Commission be waived.

Finally, and only after hiring a succession of attorneys to represent him, Mr. Goss was allowed to bring the item before the City's Board of Directors on February 21, 1995 for a final vote upon the waiver of the City's dedication requirement some twenty (20) months after Mr. Goss initially filed the application. The Board of Directors of the City of Little Rock, after a lengthy discussion, refused to approve Mr. Goss' requested waiver of the dedication requirement of a 55 foot right-of-way across the front of the property. Instead, the City formally imposed the condition that, in order for the property to be rezoned, Mr. Goss would be required to dedicate to the City of Little Rock, free of charge, a 55 foot right-of-way in exchange for rezoning the property at issue to C-3. Mr. Goss refused to consent to the City's demand.

As the only state remedy available to Mr. Goss would result in the loss of his property to the City of Little Rock, which is the result Mr. Goss sought to prevent, Mr. Goss filed suit against the City of Little Rock seeking injunctive relief to prevent the taking altogether, as the City of Little Rock had applied an unconstitutional condition to the grant of its discretionary authority to rezone his property. The United States District Court, Eastern District of Arkansas, Western Division, quickly dismissed Mr. Goss' lawsuit based upon Rules 12(b)(6) and 12(b)(1) of the *Federal Rules of Civil Procedure* for failure to state a claim upon which relief could be granted and for lack of subject matter jurisdiction, and specifically stated that *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) did not apply to the facts of the case. *See* Petitioner's Appendices C & D. Mr. Goss timely appealed to the United States Court of

Appeals for the Eighth Circuit, which thereafter reversed the district court's dismissal, and specifically stated that *Nollan* and *Dolan* did apply to the facts of the case. *See* Petitioner's Appendix B.

The case was tried before District Court Judge Susan Webber Wright on January 13 and 14, 1997. The district court issued its opinion on February 20, 1997, which opinion concluded that the City of Little Rock had indeed attempted a taking of Mr. Goss' property by applying an unconstitutional condition to its grant of rezoning, in contravention of *Nollan* and *Dolan*, and, in accordance with the injunctive relief requested by Mr. Goss in his Complaint, issued a mandate to the City of Little Rock to rezone Mr. Goss' property to C-3, but denied Mr. Goss his compensatory damages and attorney's fees. *See* Petitioner's Appendices E and F. The City of Little Rock, Petitioner herein, did not seek a Writ of Certiorari before this Honorable Court within the time allowed by Rule 13.1 of the *Rules of the Supreme Court of the United States.*

Petitioner timely appealed the district court's decision to the United States Court of Appeals for the Eighth Circuit, and, for the second time, argued the two (2) issues which the Eighth Circuit had previously decided against it: first, that the district court lacked jurisdiction to hear the case, and second, that neither *Nollan* nor *Dolan* applied to the facts of the case. Petitioner neither independently appealed nor independently argued reversal of the district court's decision to grant Mr. Goss the mandatory injunctive relief which he sought, the rezoning of the property at issue to C-3 without the requirement that Mr. Goss donate a significant portion of it to Petitioner,

except as an expected result of any reversal of the two (2) issues which the Eighth Circuit had previously decided against it. *See* Petitioner's Appendix B. Mr. Goss timely cross-appealed the district court's denial of compensatory damages and attorney's fees.

After oral argument, the United States Court of Appeals for the Eighth Circuit issued its opinion on August 10, 1998, in which it refused to reconsider Petitioner's arguments regarding subject matter jurisdiction and the application of the *Nollan/Dolan* line of cases, stating specifically as follows:

> The time to make these arguments has come and gone. We rejected both contentions the first time Little Rock made them. Indeed, we remanded with instructions to the District Court to apply *Dolan* in determining whether the dedication requirement was a taking. *See Goss*, 90 F.3d at 309-310. Having rejected Little Rock's arguments before, we will not reconsider them now. *Goss v. City of Little Rock*, 151 F.3d 861, 862 (8th Cir. 1998). *See also* Petitioner's Appendix A at A3.

The Eighth Circuit further reversed the district court's denial of attorney's fees to Mr. Goss, but affirmed the district court's denial of compensatory damages, neither of which is being brought for review before this Honorable Court. Although Petitioner did not appeal it, and without any comment regarding an abuse of discretion on the part of the district court nor any comment regarding the propriety of the district court's issuance of mandatory injunctive relief to Mr. Goss, the Eighth Circuit *sua sponte* reversed the mandatory injunction granted to Mr. Goss by the district court, that Petitioner rezone

Mr. Goss' property to C-3 without the attachment of the unconstitutional condition Petitioner attempted to place upon the grant of Mr. Goss' rezoning application. *See* Petitioner's Appendix A.

In its Petition for Writ of Certiorari filed herein, Petitioner once again attempts to argue the same two (2) issues it has argued unsuccessfully twice before in the Eighth Circuit: that the district court lacked jurisdiction to hear this case at all, and that the *Nollan/Dolan* line of cases is inapplicable to the facts of this case. This Conditional Cross-Petition addresses only the issue of the *sua sponte* reversal of the district court's issuance of a mandatory injunction to Petitioner to rezone Mr. Goss' property to C-3 without the attachment of the unconstitutional condition Petitioner attempted to place upon the grant of Mr. Goss' rezoning application.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

I. The Eighth Circuit's *sua sponte* reversal of a separate, severable issue, not designated as an issue on appeal, has improperly expanded the jurisdiction conferred upon United States Circuit Courts of Appeals, in conflict with decisions of other United States Circuit Courts of Appeals, thereby warranting review by this Honorable Court.

The jurisdiction of United States Courts of Appeals, set forth in 28 U.S.C. § 1291, while encompassing all final orders of district courts, is not without limits. In contravention of case law extant in the Third and Fifth Circuit Courts of Appeals, and in conflict with its own prior case

law, the Eighth Circuit Court of Appeals exceeded its jurisdiction by reversing, *sua sponte*, the mandatory injunction issued by the district court, as the issue was not appealed from by the Petitioner herein at any stage.

The *Federal Rules of Appellate Procedure* requires, in Rule 10(b)(3), *inter alia*, that an appellant file a statement of the issues it intends to present on the appeal and serve a copy of same upon the appellee in order to apprize the appellee of the specific issues to be appealed. In the second *Goss* appeal, and in accordance with Rule 10(b)(3), the City of Little Rock designated the issues on appeal as three-fold: subject matter jurisdiction (previously decided in Mr. Goss' favor in the first *Goss* appeal); application of *Dolan* rough proportionality (also previously decided in Mr. Goss' favor in the first *Goss* appeal); and whether the City had a legitimate interest to support the dedication requirement attached to Mr. Goss' rezoning application, and to deny the rezoning if Mr. Goss refused to acquiesce to the dedication.

In the second *Goss* decision, the Eighth Circuit ruled that the first two (2) issues identified and argued by the City of Little Rock were *res judicata*, as both issues had been resolved in Mr. Goss' favor in the first *Goss* appeal in 1996. *See Goss v. City of Little Rock*, 151 F.3d 861, 862 (8th Cir. 1998); Petitioner's Appendix A, at A3. Regarding the third issue identified and argued by the City of Little Rock, the Eighth Circuit stated as follows:

> Little Rock does not respond to the District Court's conclusion that it failed to carry its burden of proving rough proportionality between the dedication and the impact of the proposed rezoning. Instead Little Rock makes several

> arguments that have nothing to do with rough proportionality. Perhaps Little Rock takes this course because of its belief that *Dolan* is irrelevant to this case. If so, that is unfortunate for the city because, as discussed above, the argument that *Dolan* does not apply is foreclosed by our contrary decision in the previous appeal. At any rate, Little Rock's arguments, which we will briefly discuss, do not help its case. Little Rock argues that it had a legitimate reason for demanding the dedication. This is true, but it does not prove that the legitimate reason was proportionate to the demand . . . *Id.* at 863; A5.

The City of Little Rock did not, at any stage of the second *Goss* appeal, designate the district court's issuance of the mandatory injunction requiring it to rezone Mr. Goss' property as an issue to be decided by the Eighth Circuit on appeal. The Eighth Circuit's subsequent reversal of the district court's issuance of the mandatory injunction requiring the City of Little Rock to rezone Mr. Goss' property comes as a surprise, considering that, shortly thereafter, the Eighth Circuit itself, in *C & S Acquisitions Corp. v. Northwest Aircraft, Inc.*, 153 F.3d 622 (8th Cir. 1998) indicated that notice must be given to the appellee of an appellant's intent to appeal separate, distinct issues. *Cf. Davenport v. Riverview Gardens Sch. Dist.*, 30 F.3d 940 (8th Cir. 1994) (noting that omission of reference to the order appealed from jurisdictionally bars the appeal); *see also Smith v. Barry*, 502 U.S. 244, 112 S.Ct. 678, 116 L.Ed.2d 678 (1992) (contents of notice of appeal are jurisdictional and must be satisfied before a court of appeals may entertain the appeal); *Trust Co. of La. v. N.N.P., Inc.*, 104 F.3d 1478 (5th Cir. 1997) (court of appeals is without jurisdiction to hear challenges to rulings or

orders not specified in the designation of issues on appeal).

The Third Circuit Court of Appeals, in *MCI Telecommunications Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1092 (3rd Cir. 1995), *cert. denied*, ___ U.S. ___, 117 S.Ct. 64, 136 L.Ed.2d 25 (1996), noted that a court of appeals does not acquire jurisdiction over any issue which is not designated for appeal in accordance with the *Federal Rules of Appellate Procedure*, thereby indicating that a United States Court of Appeals may not *sua sponte* reverse separate, distinct issues from those appealed from by one of the parties to the appeal, unless the reversal of such an issue is made necessary by the reversal of an appropriately designated issue on appeal. Applying the Third Circuit rule to this case, the Eighth Circuit acted improperly by reversing the mandatory injunction, as the mandatory injunction was not designated as an issue on appeal by any party to the appeal, nor was the reversal of the mandatory injunction necessitated by the reversal of an appropriately designated issue on appeal.

Due to the apparent conflict between the Third, Fifth and Eighth Circuits regarding the jurisdiction of the United States Courts of Appeals to hear and decide issues which are not designated as such on appeal, this Honorable Court should grant Cross-Petitioner's Conditional Cross-Petition for Writ of Certiorari.

II. The Eighth Circuit's reversal of a mandatory injunction, without a finding of abuse of discretion or impropriety on the part of the district court, is in conflict with decisions of other United States Circuit Courts of Appeals, thereby warranting review by this Honorable Court.

A district court is given broad discretion in its decision to evaluate and determine the propriety of issuing injunctive relief, and its discretion will not be overturned absent evidence of strong or clear abuse of its discretion in the issuance of an injunction. *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221 (10th Cir. 1997); *Conservation Law Foundation, Inc. v. Busey*, 79 F.3d 1250 (1st Cir. 1996); *see also Malkentzos v. DeBuono*, 102 F.3d 50 (2nd Cir. 1996); *Stanley v. University of Southern California*, 13 F.3d 1313 (9th Cir. 1994).

In the case at hand, the Eighth Circuit's decision is in apparent conflict with the decisions of the First, Second, Ninth and Tenth Circuits regarding the standard to overturn the issuance of an injunction, as the Eighth Circuit does not state anywhere in its decision that the district court abused its discretion in granting Mr. Goss' prayer for injunctive relief. Regarding its reversal of the district court's injunction, the Eighth Circuit states only as follows:

> Next we consider the question of remedy. The District Court ordered that, because the dedication requirement was a taking, Little Rock must rezone Goss's property without the requirement. We reverse this order. As discussed above, Little Rock has a legitimate interest in declining to rezone Goss's property, and the city may pursue that interest by denying Goss's rezoning

> application outright, as opposed to denying it because of Goss's refusal to agree to an unconstitutional condition, as the city did here. [footnote omitted] *See Nollan*, 483 U.S. at 835-36, 107 S.Ct. 3141 (stating that the government may deny the applicant's request outright if it has a legitimate interest in doing so). *Goss*, 151 F.3d 861, 863-864 (8th Cir. 1998); Petitioner's Appendix, A, at A6.

The Eighth Circuit does not at all address whether or not it found the district court's issuance of the mandatory injunction in this case to be an abuse of discretion, neither does it discuss whether it found the district court's issuance of the mandatory injunction to be improper in any way. Rather, it utilizes the *Nollan* case, standing alone, as the rationale behind its reversal. In doing so, the Eighth Circuit has significantly departed from the case law of other circuits, as stated *supra*, which indicates that an injunction will not be overturned in the absence of the district court's abuse of discretion or impropriety in its issuance, which significant departure warrants review by this Honorable Court to resolve the apparent conflict among the United States Courts of Appeals, and to maintain consistency in this area of law.

CONCLUSION

For the foregoing reasons, Cross-Petitioner's Conditional Cross-Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION

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QUESTION PRESENTED

Whether a circuit court's reversal of a district court's order to rezone property was proper when, in addressing the issue of remedy after the appellant city briefed the legitimate reasons for denying the rezoning, the appeal court found that the district court's order was based on an erroneous application of the law, and when the reviewing standard employed was consistent with that of other circuits.

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BRIEF IN OPPOSITION

The Cross-Respondent, City of Little Rock, respectfully requests that this Court deny the Conditional Cross-Petition for writ of certiorari filed by Charles Goss, seeking review of the Eighth Circuit's opinion in this case, which Cross-Petition was received by Cross-Respondent on February 3, 1999. The opinion appealed from is reported at 151 F.3d 861 (8th Cir. 1998).

STATEMENT OF THE CASE

The City of Little Rock has provided in some detail the factual background of this case in its own petition. To avoid repetition, the City respectfully refers the Court to that Statement of the Case, incorporating it by reference, and confines its efforts here to pointing out the mistakes present in the Statement of the Case provided by Mr. Goss in his petition and giving the reasons why the Court should deny the writ sought in the Conditional Cross-Petition.

A. Goss does not accurately describe the status of his property.

Goss is in error when he describes his property as nonconforming with its R-2 zoning. While it is true that the lot with the businesses is nonconforming, the lot with Goss's residence, which represents at least half of the property Goss sought to rezone (R. 61-62), conforms with its designated R-2, Single Family Residential zoning

(R. 162, 244), and is therefore not "nonconforming." Furthermore, it was not necessary for Mr. Goss to have the property "rezoned to conform to its use in order to sell the property" as he claims. Cross-Pet. p. 4. Not only did the use of at least half the property already conform with the existing zoning classification, the uncontroverted testimony of the City's real property valuation expert was that a denial of rezoning would not reduce the value of the property or prevent Goss from selling the property for continued use of the existing businesses (R. 297-99).

B. Goss mistakenly characterizes the actions of the Planning Commission and the Board of Directors.

The Planning Commission did not impose a dedication requirement as Goss contends. The Planning Commission merely makes a recommendation to the City Board of Directors, which collectively has the power to make rezoning decisions and to decide whether to waive dedication requirements. In discussing the letter sent to Goss by the Planning Commission secretary, Goss implies, in error, that the "approval" of Mr. Goss' rezoning petition was what was on the Board's agenda, Cross-Pet. p. 4, when it was actually the "item" that was on the agenda. Plaintiff's Exh. 2.

Goss also mischaracterizes the action taken by the Board of Directors as a "final vote upon the waiver of the City's dedication requirement." Cross-Pet. p. 5. The action taken by the City Board was a singular vote on an ordinance that if passed, would have both rezoned the property from R-2 to C-3 General Commercial and waived the dedication of right-of-way. App. I 1-4. The

ordinance did not pass. Therefore, the rezoning petition was denied, and the intertwined waiver request – moot at that point – also failed. Thus, the City disputes that this action by the Board amounted to a demand. The City further disputes the characterization by Goss that the Board, after a lengthy discussion, "formally imposed the condition that, in order for the property to be rezoned, Mr. Goss would be required to dedicate to the City of Little Rock, free of charge, a 55 foot right-of-way in exchange for rezoning the property at issue to C-3." Cross-Pet. p. 5.

C. Goss misstates the district court's ruling.

Goss misstates the district court's ruling granting the City's motion to dismiss when he says that the ruling was based on Fed. R. Civ. P. 12(b)(1) as well as 12(b)(6). It is clear in the opinion that the district court specifically cites to Fed. R. Civ. P. 12(b)(6) but not to Rule 12(b)(1), and the court's opinion never mentions the word "jurisdiction." App. C4. The opinion proceeds to state that Goss had not alleged a diminution in value of his property, that he had not suffered a loss as a result of the denial of his application, and that the availability of a state-court remedy for inverse condemnation "precludes a finding that any taking of plaintiff's property is in violation of a right, privilege or immunity secured by the Constitution or laws of the United States." App. C5-6. The opinion then discussed substantive due process and procedural due process before granting the motion to dismiss. This is far different from stating that federal

courts lack jurisdiction to hear Goss's case. Instead, the question of jurisdiction was passed on *sub silentio*.

Goss, citing Petitioner's App. C and D, also states that the district court dismissed the lawsuit and "specifically stated that *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) did not apply to the facts of the case." Cross-Pet. p. 3. The Memorandum and Order that dismissed the lawsuit mentioned neither case. App. C. In addition, the *Nollan* case was also not cited in the district court's order denying Goss's Motion to Alter Judgment. App. D. In the order denying the Motion to Alter Judgment, the district court does refer to the *Dolan* case and explains its inapplicability. In so doing, it specifically states: "The Court did not cite this case in its Memorandum and Order because the nature of plaintiff's complaint and his response to the City's motion to dismiss did not require it." App. D2.

Another misstatement by Goss is that the district court opinion (after trial) concluded that the City had indeed "attempted a taking" of Mr. Goss's property, in contravention of *Nollan* and *Dolan*. Cross-Pet. p. 6. Although the opinion concluded, consistent with the findings of the Eighth Circuit and the evidence adduced at trial, that the City had not met its burden of demonstrating rough proportionality and was therefore required to rezone the property to C-3 without a dedication of any property rights, it never actually stated that the City's actions effected a taking or even the claimed "attempted" taking. App. E10-11. Furthermore, the district court opinion specifically found that the required nexus between

the rezoning and the requested dedication does exist, App. E6-7, and it never mentioned the *Nollan* case at all.

D. Goss misstates Arkansas law on available remedies for inverse condemnation.

Although Goss contends that the only state remedy available to him would result in the loss of his property to the City, Cross-Pet. p. 5, equitable relief is available in Arkansas to enjoin takings until just compensation is provided. *MAK Co. v. Smith*, 763 F. Supp. 1003 (W.D. Ark. 1991).

E. Goss mischaracterizes the City's arguments on appeal and the Eighth Circuit's ruling reversing the order to rezone.

Contrary to Goss's claim, the Eighth Circuit's ruling on the reversal of the order to rezone did address the propriety of the district court action, as discussed in Section I below. Goss leaves the impression in his Statement of Facts that the City did not specifically appeal or argue reversal of the district court's order to rezone his property. The City disputes that contention in Section II below.

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION

I. No conflict exists among the circuit courts of appeals on the standard for reviewing a district court's order concerning injunctive relief.

Goss's Cross-Petition presents no significant constitutional issue for this Court to review. It is well-settled law that federal courts are not to act as zoning boards of appeal. The Eighth Circuit recognized this point and corrected the district court's efforts to the contrary.

Goss erroneously posits that the standard employed by the Eighth Circuit in reversing the district court's order to rezone conflicts with that of other circuits, namely the First, Second, Ninth, and Tenth Circuits. After trial of this matter, the district court ordered the City to rezone Goss's two lots from R-2 Single Family residential zoning to C-3 General Commercial zoning. The Eighth Circuit reversed the injunction because "Little Rock has a legitimate interest in declining to rezone Goss's property, and the city may pursue that interest by denying Goss's rezoning application outright, as opposed to denying it because of Goss's refusal to agree to an unconstitutional condition. . . . " App. A6. In support of its ruling, the Eighth Circuit cited *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835-36 (1987) for the proposition that "government may deny the applicant's request outright if it has a legitimate interest in doing so." App. A6.

Goss states, correctly, that the First, Second, Ninth, and Tenth Circuits employ an abuse-of-discretion standard in reviewing the grant of an injunction. Other circuit courts also follow an abuse-of-discretion standard of

review for decisions regarding injunctive relief. *See, e.g., Valenti v. Mitchell,* 962 F.2d 288, 298-99 (3d Cir. 1992); *Virginia Carolina Tools, Inc. v. International Tool Supply, Inc.,* 984 F.2d 113, 116 (4th Cir. 1993); *Dayton Area Visually Impaired Persons, Inc. v. Fisher,* 70 F.3d 1474, 1480 (6th Cir. 1995); *Wesch v. Folsom,* 6 F.3d 1465, 1469 (11th Cir. 1993).

Despite Goss's claims to the contrary, the Eighth Circuit likewise follows the abuse-of-discretion standard for reviewing a district court's grant of injunctive relief. *First Bank v. First Bank System, Inc.,* 84 F.3d 1040, 1044 (8th Cir. 1996); *Hosna v. Groose,* 80 F.3d 298, 303 (8th Cir. 1996); *Thompson v. Edward D. Jones & Co.,* 992 F.2d 187, 189 (8th Cir. 1993). According to the Eighth Circuit, "[a]buse of discretion occurs if the district court rests its conclusion on clearly erroneous factual findings or if its decision relies on erroneous legal conclusions." *Hosna,* 80 F.3d at 303.

While appellate courts uniformly employ an abuse-of-discretion standard for decisions on injunctions, they do not necessarily defer to district courts when the district court has based its decision on an erroneous legal conclusion. *See, e.g., Molecular Technology Corp. v. Valentine,* 925 F.2d 910 (6th Cir. 1991) ("This court may, in its discretion, consider clear errors in the proceedings below in an unusual case *sua sponte* regardless of the inattentiveness of the court or the parties."). *See also Uno v. City of Holyoke,* 72 F.3d 973, 978 (1st Cir. 1995) ("the jurisprudence of clear error 'does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.' "); *United States v. McCombs,*

30 F.3d 310, 317 (2d Cir. 1994) (" 'when the issue is [the trial court's] application of a legal standard to facts undisputed or reasonably found' our review is not limited by the clearly erroneous standard and we will not shy away from plenary review where . . . 'the result does not jibe with the applicable rule of law.' "); *Carey v. Pennsylvania Enterprises, Inc.*, 876 F.2d 333, 337 (3rd Cir. 1989) ("Our review of the district court's application and interpretation of legal principles predicate to its grant or denial of injunctive relief is plenary."); *Virginia Carolina Tools, Inc.*, 984 F.2d at 116 ("While decisions pertaining to injunctive relief normally are reviewed solely for abuse of discretion in applying the injunction standard, [the Fourth Circuit] review[s] such a decision *de novo* where it 'rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance.' ") (citations omitted); *Dayton Area Visually Impaired Persons, Inc.*, 70 F.3d at 1480 (Sixth Circuit appellate review under the abuse-of-discretion standard; district court determination disturbed only if it relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard); *United States v. BNS, Inc.*, 858 F.2d 456, 460 (Ninth Circuit will reverse or modify an order granting preliminary injunction if the court based its decision on erroneous legal standards or otherwise abused its discretion); *Guadamuz v. Bowen*, 859 F.2d 762, 766 (9th Cir. 1988) (stating "grant of permanent injunctive relief is reviewed for an application of erroneous legal principles"); *United States v. Jenks*, 22 F.3d 1513, 1519 (10th Cir. 1994) (grant of injunction reviewed under abuse-of-discretion standard and court has authority to modify it if it is overbroad);

Wesch v. Folsom, 6 F.3d at 1469 ("The grant of an injunction is reviewed for abuse of discretion. . . . However, if the trial court misapplies the law we will review and correct the error without deference to that court's determination.").

No conflict exists among the circuits regarding the standard of review for injunctive relief or an appellate court's authority to review and correct an injunction where it is predicated on an erroneous legal principle. Therefore, this issue does not merit Supreme Court review.

II. The Eighth Circuit's reversal of the order to rezone Goss's property has not expanded the scope of federal appellate jurisdiction.

Goss claims that the reversal of the district court's order to the City to rezone his property improperly expanded the jurisdiction of the United States Circuit Courts of Appeals. The authority of federal appellate courts in review is set forth in 28 U.S.C. § 2106 (1998):

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

This provision "gives a court of appeals some latitude in entering an order to achieve justice in the circumstances." *United States v. Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 29 (1983). This is so even in some

cases where the issue decided was not within the issues formally appealed. *Id.* "[L]itigants' failure to address the legal question from the right perspective does not render us powerless to work the problem out properly. A court of appeals may and often should do so unbidden rather than apply an incorrect rule of law to the parties' circumstances." *Williams-Guice v. Board of Educ. of City of Chicago*, 45 F.3d 161, 164 (7th Cir. 1995).

This Court has of course recognized an appellate court's power to correct errors of law. *See, e.g., Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). In *Bose*, the Court's attention was directed to the language of Fed. R. Civ. P. 52(a), which states that a trial court's findings of fact are not to be set aside unless clearly erroneous. The *Bose* Court stated:

> Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.

Id. at 501. As noted in Section I above, the circuit courts of appeals employ their authority to reverse or modify injunctive relief ordered by district courts under appropriate circumstances. Because the Eighth Circuit's action in reversing the injunction was within its statutory authority of review, it does not merit this Court's review.

Supreme Court review of the reversal of the order to rezone is also not warranted because the issue of the legitimacy of the City's interests in denying the rezoning was briefed at length by the City in the Appellant's Brief and was at the core of the City's appeal before the Eighth

Circuit. One of the specified issues before the Eighth Circuit was the following: Would rezoning Goss' property and granting a waiver of dedication have an adverse impact on the City's legitimate interests, such that there was no Fifth or Fourteenth Amendment violation when the City denied the rezoning and waiver? Appellant's Brief p. 25. The propriety of the denial of rezoning was inextricably intertwined with that issue, and the City argued at length in its brief that the City Board of Directors had legitimate reasons for denying the rezoning and waiver measure Goss had placed before it. Appellant's Brief pp. 29-34, 36-37.

The brief advanced specific reasons for the denial of rezoning: the expressed opposition of neighbors, the residential zoning and character of the surrounding properties, the fact that 81 uses would immediately be available by right under C-3 zoning, that commercial rezoning of the R-2 lot with Goss's house would have created a nonconformity, and that the zoning Goss sought was more intense than that called for under the adopted land use plan. The brief stated other reasons for denying the rezoning and waiver, including the fact that granting a waiver of dedication would have foreclosed the City from obtaining a reasonable dedication of right-of-way at any later time, regardless of the impact of more intense development, and that rezoning with a waiver, while a windfall to Goss, would force taxpayers to either suffer the ill effects of increased congestion or pay Goss for needed right-of-way expansion at the higher commercial market value rate instead of the residential market rate. The City

also cited *Nollan* for the proposition that, under the circumstances, the governing body in that case could lawfully have denied the Nollans' request for a permit if it had so chosen, Appellant's Brief p. 24, the same proposition that was cited in the Eighth Circuit's reversal of the order to rezone. Thus, the factual and legal bases for not rezoning the property were properly raised and briefed to the Eighth Circuit.

In an earlier case, the Eighth Circuit addressed a similar contention of jurisdictional expansion through a *sua sponte* judgment on an issue not raised on appeal. *Silman Custom Painting, Inc. v. Aetna Life & Cas. Co.*, 990 F.2d 1063, 1069-70 (8th Cir. 1993). At issue was the court's authority to declare as error the district court's judgment on a counterclaim and the appeal court's order to the district court to enter a declaratory judgment that Aetna was a valid assignee. It was asserted that the issue was not presented on appeal and that the Eighth Circuit decided the issue *sua sponte*, and created "a boundless exception to the limits of Appellate Court jurisdiction." *Id.* at 1069-70. The Eighth Circuit rejected the contention, citing 28 U.S.C. § 2106 (1988). *Id.* at 1069. Furthermore, the court concluded that it had determined the offset issue brought before it and decided that, although Aetna was not entitled to the offset it claimed, it was entitled to a lesser form of relief. In addition, the court noted that the issue of Aetna's rights was raised in oral argument.

In this case, the City raised and argued in its appellate brief the issue of the validity of the City Board's action in denying the rezoning in the context of adverse impacts on the City's legitimate interests. The Eighth Circuit determined the City was entitled to a reversal of

the order to rezone, an action well within its statutory jurisdiction and in keeping with the decisions of other courts of appeal, as noted in Section I above.

Without a conflict in the circuits or improper expansion of jurisdiction, no issue of importance is raised and no writ of certiorari is warranted on Goss's Cross-Petition.

CONCLUSION

For the foregoing reasons, Cross-Petitioner's Conditional Cross-Petition for writ of certiorari should be denied.

Respectfully submitted,

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